164-703 Miscellaneous

~~160-643~~

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 591.

This number differs from that in 160 643 but the case seems to be the same

CHARLES A. GREGORY, APPELLANT,

vs.

JOHN C. KEMP VAN EE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
FOR THE FIRST CIRCUIT.

MOTION TO DISMISS APPEAL, BRIEF IN SUPPORT OF MOTION, AND EXTRACTS FROM TRANSCRIPT OF RECORD.

RUSSELL GRAY,
Solicitor for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No.

CHARLES A. GREGORY, APPELLANT,

vs.

JOHN C. KEMP VAN EE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE FIRST CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

CHARLES A. GREGORY, *Appellant*,

v.

JOHN C. KEMP VAN EE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF JOHN C. KEMP VAN EE TO DISMISS APPEAL.

And now comes John C. Kemp Van Ee, appellee in this cause, and moves to dismiss the above appeal of Charles A. Gregory with costs; and for the ground of this motion he respectfully says that it appears by the record that this cause was originally brought by said Gregory, a citizen of the State of Illinois, in the Supreme Judicial Court of Massachusetts against F. A. Pike, a citizen of the State of Maine, and W. C. N. Swift, a citizen of the State of Massachusetts, and was by said Gregory duly removed to the Circuit Court of the United States for the District of Massachusetts upon the ground of the diverse citizenship of the parties (p. 10, *infra*); that Kemp Van Ee, not being a citizen of the same State as the plaintiff or either of the defendants, was by order of Court made a party defendant to the suit (p. 12), answered (p. 12), and filed by leave of Court a cross-bill (p. 13); that said cause was heard and determined in said Circuit Court (p. 22), and upon due appeal to the Circuit Court of Appeals for the first circuit was by said last-mentioned Court determined by its decree dated Jan. 31, 1895, whereby the cross bill of said Kemp Van Ee was ordered to stand as an intervening petition *pro interesse suo* (p. 23); from that

decree said Gregory brought to this Court an appeal which was dismissed for want of jurisdiction (p. 24); thereupon the Circuit Court made a final decree in accordance with the mandates of this Court and the Circuit Court of Appeals (p. 25), and from that decree Gregory has brought this appeal.

Wherefore, the jurisdiction of the Circuit Court being clear, said Kemp Van Ee prays as above, and has caused to be printed all such parts of the record as bear upon the allowance or refusal of this motion.

By his Solicitor,

RUSSELL GRAY.

BRIEF FOR THE MOTION.

The only ground on which it is sought to maintain this appeal is that the jurisdiction of the Circuit Court is in issue (Stat. 1891, Chap. 517, Sect. 5). But as the Circuit Court of Appeals remarked in its opinion (67 Fed. Rep. 837, 847) "The Court perceives no ground on which any question of jurisdiction can be raised. The removal from the State Court was under the act of March 3, Chap. 137, Sect. 3 (18 Stat. 471), and an examination of the papers shows that it was correctly made." The question whether the proper procedure was to make Kemp Van Ee a defendant and allow him to file a cross bill, as the Circuit Court supposed, or to permit him to assert his claim as an intervening petitioner as the Circuit Court of Appeals decided, is not before this Court, for the question of jurisdiction is alone in issue here, and it is clear that his presence in the suit could not in any event affect the jurisdiction of the Circuit Court.

The statement in the assignment of errors that Kemp Van Ee is a citizen of the State of New Jersey is quite immaterial, but it may be observed that in his answer (p. 20) Gregory admitted that Kemp Van Ee was a citizen of the Kingdom of Great Britain.

RUSSELL GRAY,

of Counsel for J. C. KEMP VAN EE.

EXTRACTS FROM TRANSCRIPT OF RECORD.

(RECORD PAGE 3.)

BILL OF COMPLAINT.

[FILED IN SUPREME JUDICIAL COURT OF MASSACHUSETTS, DEC. 16, 1884.]

Charles A. Gregory, of the city of Chicago and State of Illinois and a citizen of said State of Illinois, brings this his bill of complaint against Francis A. Pike, of Calais, in the State of Maine, and citizen of said State of Maine, and William C. N. Swift, of the city of New Bedford, in the state of Massachusetts, and a citizen of said State of Massachusetts.

And thereupon the plaintiff complains and says that on or before the thirtieth day of March, 1883, he was the owner of eighty thousand shares of the capital stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois, a corporation duly established under the laws of the said State of Illinois, and, being such owner, he delivered the same to one George W. Butterfield, in the city of Boston, Massachusetts, and took of said Butterfield a receipt or declaration of trust in the words and figures following, to wit:

BOSTON, March, 30, 1883.

Received of Charles A. Gregory 80,000 shares of the stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois. I take the same to have it registered upon the books of the company in the name of George W. Butterfield, of San Francisco, as trustee, and I will deliver the same to said Gregory on demand, and in the meantime hold the same in trust for him as his property.

G. W. BUTTERFIELD.

That said Butterfield procured the said shares to be registered in his own name on the books of said corporation, and thereafter, on or about the fourth day of April, 1883, negotiated the sale of said shares to the defendant Swift for the sum of $46,400, and in payment for said shares took or received from said Swift five thousand dollars in cash and his two notes of hand, dated April 4, 1883, each for $20,334.60, payable to the order of said George W. Butterfield, one payable in two years and one in three years after said date, with interest at the rate of six per cent. per annum; and the plaintiff says that the said Butterfield indorsed the same and then delivered to him the said two notes of said Swift for $20,334.60 at the city of New York, on the ninth day of April, 1883, when the plaintiff was to embark for Europe on the next day thereafter, to be absent for some time, and did so embark and was in fact absent from this country till the January following; that he, the plaintiff, then and there on the ninth day of April aforesaid, returned the said notes

to the said Butterfield on the execution and delivery by said Butterfield to him of an agreement or declaration of trust in the words and figures following, to wit:

NEW YORK, April 9, 1883.

I hold in my hand notes of W. C. N. Swift, dated New Bedford, Mass., 1883, 4m., 4th, one due two years after date for $20,334.60, one due three years after date for $20,334.60, payable to order of Geo. W. Butterfield, with interest at six per cent. per annum. These two notes belong to Charles A. Gregory and the proceeds of them, and I agree to deliver the same to him upon request or the full amount of money expressed therein, and I also owe an account and payment to said Gregory for $730.80, being his *pro rata* of the two other notes of similar description held by me belonging to J. C. Kemp. Gregory is entitled to one-half of this $730.80 in two years and one-half in three years, with interest as above.

G. W. BUTTERFIELD.

And the plaintiff says that said Butterfield became thereby the bailee, depositary, or holder of said two notes in trust for the plaintiff and subject to the plaintiff's orders concerning the same and had no power or authority from the plaintiff to dispose of said notes in any way, unless, perhaps, to receive payment thereof from said Swift, to whom the said Butterfield had promised and agreed that said notes should not be put on the market for sale or offered for discount; and the plaintiff further shows that the said Butterfield, soon after the receipt of the said two notes from said Gregory as aforesaid (to wit, on or about the tenth day of April, 1883), passed over the said notes to one Charles F. Jones, his friend and associate, who was then cognizant of the fact that the said notes belonged to the plaintiff and were held by the said Butterfield as trustee for the plaintiff as aforesaid and not otherwise, and the said Jones took the said notes to the said Swift, the maker, and gave up or surrendered the same to him, taking in place of one of said notes an instrument, dated April 20, 1883, signed by said Swift, by which he promised to pay to said Jones a like sum of $20,334.60 in three years from date, with interest, but not negotiable, and in place of the other note of $20,334.60 the said Jones took in part another instrument, dated April 20, 1883, signed by said Swift, by which he promised to pay to said Jones the sum of $15,000 or thereabouts (the precise sum being unknown to the plaintiff at this time, but is believed to be about $15,000), payable in two years from its date, with interest, but not negotiable.

And the plaintiff, further complaining, shows that these two contracts or instruments in writing signed by said Swift, sometimes called notes, for the payment to said Jones only of said sums of $20,334.60 and of $15,000 or thereabouts, were by the said Jones passed over to the said Butterfield, to be by him held in the place

of and instead of the two notes of $20,324.60 each, intrusted to him by the plaintiff as aforesaid, and the plaintiff says that the said two new notes or contracts drawn payable only to the said Jones and coming into the hands of the said Butterfield in renewal of or substitution for the two notes first given to said Butterfield by said Swift were affected by the same trust in favor of the plaintiff which was attached to the said two notes last mentioned when placed in the hands of said Butterfield, as trustee for the plaintiff as above set forth.

And the plaintiff says that the said Butterfield had no right to deal with the said new instruments as his own and took no title whatever thereto from or under the said Jones as payee or assignor of the same to him, but stood in the same relation to the said Gregory with regard to the said two notes or instruments which he previously held respecting the two original notes of said Swift, as above mentioned, payable to the said Butterfield and exchanged for the two new notes or instruments made payable to said Jones.

And the plaintiff, further complaining, shows that the said Butterfield, while thus holding the two said last-named instruments in special trust for the plaintiff as aforesaid, viz., on the thirty-first day of July, 1883, entered into a certain contract in writing with the defendant Pike, a copy of which is annexed hereto, marked "Exhibit A," and is a part hereof, by which contract the said Butterfield undertook and agreed to purchase of the said Pike certain mining property situated in California, and to pay therefor to said Pike the sum of $242,666, payable as follows, viz.: —

The sum of $25,000 at the time of the execution of the contract and the residue, to wit, $217,266, on or before the first day of January, 1884; and the said Pike was not to give to said Butterfield any title to the mining property so contracted for by him until the purchase-money thereof should have been paid in full; and the said Butterfield had no means and was unable to meet the cash payment of $25,000, and was known by said Pike to be unable to make the payment at the said time; and thereupon the said Butterfield, acting in fraud of the plaintiff and in violation of the agreement or trust assumed by him in regard to the notes of said Swift originally confided to him by the plaintiff as aforesaid, and subsequently exchanged for the new non-negotiable notes payable to said Jones as aforesaid, delivered or passed over to said Pike the said two instruments of April 20, 1883, by way of pledge as collateral security for the payment of the said sum of $25,000, making part of the amount to be paid by him to the said Pike as purchase-money for the said mining property of the said Pike.

And the plaintiff is informed and believes, and therefore says, that the said two instruments signed by said Swift under date of April 20, 1883, and payable to the said Jones, the name of said Jones having been previously placed by him upon the back of said instruments,

were delivered to and lodged with said Pike by said Butterfield as and for security for the $25,000 payment, as set forth in the memorandum entered at the back of said contract "A" and hereby made a part of this bill by reference.

And the plaintiff, further complaining, shows that just previously to the execution of this contract of July 31, 1883, the said Butterfield represented to the plaintiff that he still remained in possession of the two notes first given by said Swift of $20,334.60 each, and that the plaintiff did not learn of the substitution by said Butterfield of said instruments for said two original notes, nor of the attempt of the said Butterfield to pledge said new instruments to said Pike as security for the payment of his own engagement for $25,000, until long afterwards, to wit, until some time in December, 1883; and thereupon the plaintiff made demand, both upon the said Butterfield and the said Pike, for the surrender and delivery to himself of the said two notes or instruments of April 20, 1883, notifying the said Pike at the same time of his ownership of the said notes or instruments before the same were passed over to him by said Butterfield by way of pledge as aforesaid; and the plaintiff further shows that the contract entered into with said Pike on the thirty-first day of July, 1883, for the purchase of said mining property was never carried into execution or performed by either the said Butterfield or the said Pike, but was abandoned by them, the said Pike retaining the said property or his title thereto as before and still continuing to hold the same, as the plaintiff is informed and believes, and being no longer bound by his said contract of July 31, 1883, nor holding the said Butterfield as bound thereby, but electing to treat said contract as mutually abandoned by both parties; and the plaintiff is informed and believes, and therefore avers, that said Pike is about to enter into negotiations for the sale of said mining property to other persons at a rate or price beyond that specified in the contract of sale to Butterfield, dated July 31, 1883, above mentioned; and the plaintiff shows that it would be contrary to equity to retain the two notes so pledged to him as security for part of the price to be paid by said Butterfield for said mining property, and at the same time to sell the said mining property to others for its full value.

And the plaintiff further shows that the said Pike having thus come into possession of the said notes or instruments, being at the time the property of the plaintiff, through the fraud of the said Butterfield or his breach of trust, and to enable him, said Butterfield, to obtain from said Pike the contract of July 31, as above mentioned, the said Pike now holds no title to the said notes or instruments by reason of the delivery or pledge thereof to him made by said Butterfield, but holds them as trustee for the plaintiff as fully as the said Butterfield himself was such trustee, and so the said Pike is in equity bound to surrender the said notes to the plaintiff, as he has been heretofore requested to do; and the plaintiff, further complaining,

shows that the said Swift has been notified by the plaintiff of his ownership of the said notes or instruments and of the fraud practised on the plaintiff by delivering or pledging the same to said Pike as aforesaid, and has been cautioned by the plaintiff to pay the same to no one but the plaintiff, and that the plaintiff will indemnify said Swift against the claims of any one else upon or against him, the said Swift, by reason of the said notes or instruments.

And the plaintiff further shows that the said instruments — not promissory notes in the legal sense of that term, nor negotiable or transferable as such by indorsement, but are simple contracts for the payment of money to the said Jones and him only, and that the fraudulent pledge or deposit of said notes or instruments with the said Pike as aforesaid has not conferred on said Pike any right of action whatever against the said Swift upon said instruments, and that said Swift cannot lawfully discharge said instruments or contracts by dealing in relation thereto with the said Pike or any one excepting this plaintiff.

And the plaintiff further shows that the said Pike, unless restrained by the order or decree of this court, may undertake to sell or transfer the said two notes or instruments to some person who is not cognizant of the facts hereinabove set forth in regard to the plaintiff's ownership thereof and has threatened to do so or to expose the same to sale by auction, or the said Pike might place them beyond the reach of the plaintiff or surrender them to the said Swift or to the said Butterfield or the said Jones, or execute a release or discharge thereof in some way under the pretence of lawful authority to do so; and the said Swift, unless restrained by this honorable court, might also procure the surrender of the said notes or contracts by the said Pike to him in disregard of the right of the plaintiff in and to the same; and this plaintiff is apprehensive lest the said Pike may deal with said notes in some of the ways above mentioned unless restrained by this honorable court.

To the end, therefore, that the said Pike may be compelled by decree of this honorable court to surrender the said two notes or contracts of the said Swift and deliver them over to the plaintiff and may be restrained from dealing with another person than the plaintiff as the lawful owner of the said notes or contracts, and from making payment of the same or of any part thereof except to the plaintiff, and that the plaintiff may have such other and further relief in the premises as he may be entitled to, the plaintiff prays that the usual process of subpœna may issue, directed to the said Francis A. Pike and the said William C. N. Swift, requiring them respectively to appear in this honorable court and make answer to this bill of complaint, the plaintiff hereby waiving any answer upon oath by either of said defendants.

CHARLES A. GREGORY.

F. A. Brooks, *Solicitor for Plaintiff.*

* * * * * * * * * * *

[RECORD, PAGE 26.]

PETITION FOR REMOVAL TO CIRCUIT COURT.

[FILED IN SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 28, 1885.]

To the Honorable the Justices of the Supreme Judicial Court for the County of Suffolk and Commonwealth of Massachusetts.

Your petitioner, Charles A. Gregory, plaintiff in the above-entitled suit, respectfully shows that the matter and amount in dispute in said cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States; that said petitioner at the time of bringing said suit was, and still is, a citizen of the State of Illinois; that the said Frederic A. Pike, one of the defendants, then was and still is a citizen of the State of Maine; that William C. N. Swift, the other defendant, then was, and still is, a citizen of the State of Massachusetts; and your petitioner shows that the present April term of said Court is the first term at which said cause could be tried, and your petitioner desires to remove this suit, before the trial thereof, into the next Circuit Court of the United States, to be held in the district of Massachusetts on the fifteenth day of May next, at Boston, in said district, pursuant to the provisions of law contained in the act of Congress approved March 3, 1875, and your petitioner offers herewith his bond, with good and sufficient surety, for entering in the said Circuit Court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if it shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further in said cause except to make the order of removal required by law, and to accept the said bond, and to cause the record of this suit in this court to be removed into the said Circuit Court of the United States at the next term thereof to be held as aforesaid.

CHARLES A. GREGORY.

F. A. BROOKS,
Solicitor for Plaintiff.

A true copy.

Attest: JOHN NOBLE, *Clerk.*

* * * * * * * * * * *

[RECORD, PAGE 28.]

ORDER FOR REMOVAL TO CIRCUIT COURT.

[ENTERED IN SUPREME JUDICIAL COURT OF MASSACHUSETTS, MAY 5, 1885.]

And now, in the above-entitled cause, it appearing to the court that the plaintiff has duly filed in this court his petition praying for the removal of said cause to the Circuit Court of the United

States for the district of Massachusetts, and also a satisfactory bond, pursuant to the statute of the United States.

It is ordered that this cause be removed to the Circuit Court of the United States, in accordance with the prayer of said petition.

By the court:

JOHN NOBLE, *Clerk.*

MAY 5, 1885.

A true copy.

Attest: JOHN NOBLE, *Clerk.*

* * * * * * * * * * *

[RECORD, PAGE 55.]

MOTION TO MAKE J. C. KEMP VAN EE A DEFENDANT.

[FILED DEC. 11, 1885.]

Now comes William C. N. Swift, one of the defendants in the above-entitled cause, and moves that this honorable court may order J. C. Kemp Van Ee, named in the answer of this defendant, filed April 14, 1885, to be made a party defendant in the said cause.

WILLIAM C. N. SWIFT.

By his Solicitor,

HENRY W. SWIFT.

* * * * * * * * * * *

[RECORD, PAGE 55.]

PETITION OF JOHN C. KEMP VAN EE.

[FILED DEC. 22, 1885.]

[PETITION OF JOHN C. KEMP VAN EE TO BE MADE A PARTY DEFENDANT.]

To the Honorable the Justices of the Circuit Court of the United States, sitting in equity:

Petitioning, showeth unto your honors, John C. Kemp Van Ee, of London, England, in the Kingdom of Great Britain, that the said Gregory, plaintiff in the said suit, in his bill of complaint, among other things, refers to and describes a certain instrument, dated April 20, A. D. 1883, and signed by the defendant Swift, by which the said Swift promised to pay one Charles F. Jones the sum of fifteen thousand (15,000) dollars, or thereabouts, payable in two years from its date, with interest, but not negotiable, which said instrument is now due and payable and is wrongfully in the possession of the defendant Frederic A. Pike; that the said Gregory in his said bill of complaint lays claim to the whole of the proceeds of said instrument, and prays in his said bill that the said defendant, Pike, may be compelled by decree of this Honorable Court to surrender the said instrument and to deliver it to him, the said Gregory, and may be restrained from dealing with any other person than the plaintiff Gregory as the lawful owner of said instrument, and from

making payment of the same or any part thereof except to the plaintiff Gregory.

And your petitioner further shows that he was at the time of and for a long time previous to the bringing of said bill of complaint and that he is now owner of a one-half interest in the instrument above described in the said plaintiff's bill of complaint and is entitled to receive one-half of the proceeds of said instrument, and is entitled to the possession of said instrument, equally with the said Gregory, as against the said defendant, Pike; all of which will more fully appear in your petitioner's answer to said bill of complaint to be hereafter filed if your petitioner be made a party defendant in said suit.

Wherefore your petitioner, in order to enable this Honorable Court to do equity in said suit, respectfully prays this Honorable Court that he may be joined in said suit as a party defendant thereto, and that as such defendant he may be allowed to file his answer in said suit, duly presenting his claim to this Honorable Court.

JOHN C. KEMP VAN EE.
By WILLIAM F. WHARTON, *his Solicitor.*

* * * * * * * * * * *

[RECORD, PAGE 62.]

ORDER OF COURT.

[FILED JAN. 22, 1886.]

COLT, J. The petition of John C. Kemp Van Ee to be made a party defendant is granted.

The motion of Swift, defendant, to make J. C. Kemp Van Ee a party defendant is granted.

The motion of Swift, defendant, to allow the deposition of J. C. Kemp Van Ee as a part of the record in the case is granted.

The motion of defendant Swift to make George W. Butterfield a party defendant is granted.

The motion of the complainant for dismissal of bill as to defendant Swift is denied. By the Court,

JOHN G. STETSON, *Clerk.*

* * * * * * * * * * *

[RECORD, PAGE 63.]

ANSWER OF JOHN C. KEMP VAN EE.

[FILED MARCH 13, 1886.]

And this defendant now comes and claims to be interested in the matters of this suit by virtue of the circumstances hereinafter set forth.

1. It is true that on or about the fourth day of April, 1883, one George W. Butterfield negotiated the sale to the defendant William C. N. Swift of eighty thousand shares of the capital stock of the

Great Sierra Consolidated Silver Company of Chicago, Ill., belonging to the plaintiff.

2. And this defendant further answers and says that at the same time and as part of the same transaction of sale the said George W. Butterfield also negotiated the sale to the said defendant, William C. N. Swift, of about seventy-nine thousand shares of the capital stock of said Great Sierra Consolidated Silver Company belonging to this defendant.

3. That, in payment for the one hundred and fifty-nine thousand shares of the capital stock of the said Consolidated Silver Company so sold, the said defendant, Swift, gave the said Butterfield ten thousand dollars in cash and four negotiable promissory notes signed by the defendant Swift, each for $20,334.60, two at two years, two at three years, payable to said Butterfield or order; that of the cash so received by the said Butterfield $5,000 was paid to the plaintiff Gregory, $500 to this defendant, and the remainder $4,500, was retained by the said Butterfield, which said remainder rightfully belongs to this defendant, and the said Butterfield has given no acknowledgement or receipt therefor to this defendant; that this defendant holds and still has in his possession said acknowledgement or receipt and has never at any time received the said $4,500 or any part thereof.

4. That the four notes were left in the possession of said Butterfield by the plaintiff and by this defendant; that this defendant owned two of these notes, one for two years and one for three years, and that the plaintiff owned the other two notes; that this defendant gave authority to the said Butterfield to raise ten thousand dollars on the two years' note belonging to him in order to fulfil the terms of a certain contract between this defendant and said Butterfield and one Charles F. Jones, dated April 7, 1883, made at or about the time that the notes were left in the possession of said Butterfield; that at or about the same time a similar authority was given by the plaintiff to said Butterfield, whereby the plaintiff authorized the said Butterfield to raise ten thousand dollars upon the two years' note belonging to him, the said plaintiff; that the said Butterfield had no authority at any time from this defendant to dispose of the notes so belonging to this defendant in any way except as above authorized, but held the said notes so belonging to this defendant in trust for this defendant to deliver them to this defendant whenever he should demand the same.

5. That subsequently, on or about April 20, 1883, the said Butterfield delivered all of said four notes to one Charles F. Jones, who exchanged them with the defendant Swift for five other promissory notes, as follows, viz., one note for $10,000, at four months, payable to the said Charles F. Jones or order; one for $15,000, at six months, payable to the said Charles F. Jones or order, and one for $15,000, payable in two years, to Charles F. Jones, and two notes for $20,334.60 each, payable to Charles F. Jones in three

years; and this defendant is informed that the two negotiable notes for $10,000 and $15,000 were negotiated by the said Jones or Butterfield, and that $20,000 of the money so procured was applied by the said Butterfield and Jones to the purposes authorized by this defendant and by the plaintiff to fulfil the terms of the contracts of April 7, 1883, already referred to, $10,000 for the benefit of this defendant and $10,000 for the benefit of the plaintiff; that the remaining $5,000 was appropriated by the said Butterfield and Jones for their own purposes, and this defendant alleges that he has never received any part of said $5,000.

And the defendant further answers and says that he received from Butterfield or Jones one of the notes for $20,334.60, and that the other note for $20,334.60 is the note now in possession of the defendant Pike, to which note this defendant makes no claim; that the remaining note for $15,000 is also in the hands of the defendant Pike; that in this note this defendant alleges and claims that he has a one-half interest, and, as the note is due, that he is entitled to receive one-half of the proceeds of it from the defendant Swift when paid.

6. And this defendant further alleges that on or about Jan. 2, 1884, it was expressly agreed between the plaintiff and this defendant that this defendant was entitled to one-half interest in said note for $15,000 and to one-half of the proceeds thereof in settlement of any and all claims that this defendant had against the plaintiff arising from said sale of his shares of the capital stock of said Great Sierra Consolidated Silver Company.

7. And this defendant further answers that he believes it to be true that the said Butterfield entered into the contract with the defendant Pike, as set out in the plaintiff's bill of complaint, a copy of which is annexed to said bill, marked "Exhibit A," to which reference is made for a fuller statement thereof; and he further alleges and states that the said Butterfield, acting in fraud of this defendant and in violation of the agreement made by him with this defendant regarding said notes of said Swift originally confided to him by this defendant as aforesaid and without the knowledge or consent of this defendant, undertook to deliver or pass over to the said defendant Pike, the said note for $15,000, of April 20, 1883, by way of pledge as collateral security for the payment of the sum of $25,000, which was part of the amount to be paid by him, the said Butterfield, to the said Pike under said contract made by him with the said Pike, dated July 31, 1883.

8. And this defendant further answers and says that he was not informed and did not learn that said Butterfield had attempted to pledge said note for $15,000 to the said Pike as aforesaid until after the same had been delivered over to the said Pike by the said Butterfield, namely, until some time in the month of October, 1883, and that this defendant has never assented or agreed in any way to the possession of said note by the defendant Pike; that on or about Dec. 11, 1883, this defendant made demand upon the said Pike for the

surrender and delivery up of the said note by an instrument dated Dec. 11, 1883, and signed by this defendant, which is annexed to the answer of the defendant Pike and marked "A," to which reference is made, notifying the defendant Pike at the same time that he was the owner of an interest in said note for $15,000; that this defendant, moreover, on or about April 10, 1885, notified the defendant Swift that he claimed a one-half interest in the said note for $15,000, wrongfully attempted to be pledged by the said Butterfield or Jones to the said defendant Pike.

9. And this defendant further answers and says that the contract entered into by the said Butterfield with the said defendant Pike, dated July 31, 1883, was never performed by either the said Butterfield or the said Pike, but was and has been for some time abandoned by both of them, but that the said defendant Pike, still wrongfully retains the said note of $15,000, and refuses to deliver the same to this defendant, and has brought suit in this honorable court in the name of said Jones, to whom the said note is made payable, against the defendant Swift to recover the amount thereof to his own use.

And this defendant prays that one-half of said note for $15,000, now in the possession of the defendant Pike, be decreed to be due this defendant; that the said defendant Swift be ordered to pay said one-half to this defendant and be enjoined from paying the same to any other person whatever, and that the said Butterfield be ordered to pay to this defendant such sum as may be due from him to this defendant.

J. C. KEMP VAN EE,
By WILLIAM F. WHARTON, *his Solicitor.*

* * * * * * * * * * *

[RECORD, PAGE 114.]

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2170.

JOHN C. KEMP VAN EE, *Complainant,*
v.
CHARLES A. GREGORY ET AL., *Defendants.*

CROSS-BILL.

[FILED BY LEAVE OF COURT, NOV. 27, 1886.]

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

John C. Kemp Van Ee, of London, England, in the Kingdom of Great Britain, and a citizen of said Kingdom, brings this, his bill

against Charles. A Gregory, of the city of Chicago, and State of Illinois, a citizen of said State of Illinois; Francis A. Pike, of Calais, in the State of Maine, and a citizen of said State of Maine; William C. N. Swift, of the city of New Bedford, in the Commonwealth of Massachusetts, and a citizen of said Commonwealth; and George W. Butterfield, of San Francisco, in the State of California, and a citizen of said State of California.

And thereupon the plaintiff complains and says that he is a defendant by order of this honorable court to the original bill of complaint against the said Francis A. Pike and William C. N. Swift by Charles A. Gregory, a copy of the full record of which case and all the proceedings therein is hereto annexed and marked "A."

And the plaintiff further shows that the said defendants, Gregory, Pike, Swift and Butterfield, are the same persons as the persons of like name named in the said original bill of complaint.

And the plaintiff further shows that on or about the fourth day of April, 1883, at the time when the said Butterfield negotiated the sale to the said Swift of the eighty thousand shares of the capital stock of the Great Sierra Consolidated Silver Company of Chicago, Ill., belonging to the said Gregory, as is alleged in said original bill of complaint, the said Butterfield, at the same time and as a part of the same transaction of sale, also negotiated the sale to the said defendant William C. N. Swift of about seventy-nine thousand shares of the capital stock of said Great Sierra Consolidated Silver Company belonging to the plaintiff.

That in payment for the one hundred and fifty-nine thousand shares of the capital stock of the said Consolidated Silver Company so sold the said defendant Swift gave the said Butterfield ten thousand dollars in cash and four negotiable promissory notes signed by the defendant Swift, each for $20,334.60, two at two years, two at three years, payable to said Butterfield or order; that of the cash so received by the said Butterfield $5,000 was paid to the defendant Gregory, $500 to the plaintiff, and the remainder, $4,500, was retained by the said Butterfield, which said remainder rightfully belongs to the plaintiff, and the said Butterfield has given an acknowledgment or receipt therefor to the plaintiff; that the plaintiff holds and still has in his possession said acknowledgment or receipt, and has never at any time received the said $4,500 or any part thereof.

That the four notes were left in the possession of said Butterfield by the said Gregory and by the plaintiff; that the plaintiff owned two of these notes, one for two years and one for three years, and that the said Gregory owned the other two notes; that the plaintiff gave authority to the said Butterfield to raise $10,000 on the two years' note belonging to him in order to fulfil the terms of a certain contract between the plaintiff and said Butterfield and one Charles F. Jones, dated April 7, 1883, made at or about the time that the

notes were left in the possession of said Butterfield; that at or about the same time a similar authority was given by the said Gregory to said Butterfield, whereby he authorized the said Butterfield to raise $10,000 upon the two years' note belonging to him, the said Gregory; that the said Butterfield had no authority at any time from the plaintiff to dispose of the notes so belonging to the plaintiff in any way except as above authorized, but held the said notes so belonging to the plaintiff in trust for the plaintiff to deliver them to the plaintiff whenever he should demand the same.

That subsequently, on or about April 20, 1883, the said Butterfield delivered all of said four notes to one Charles F. Jones, who exchanged them with the defendant Swift for five other promissory notes as follows, viz., one note for $10,000, at four months, payable to the said Charles F. Jones or order; one for $15,000, at six months, payable to the said Charles F. Jones or order, and one for $15,000, payable in two years to Charles F. Jones, and two notes for $20,334.60 each, payable to Charles F. Jones in three years; and the plaintiff is informed that the two negotiable notes for $10,000 and $15,000 were negotiated by the said Jones or Butterfield, and that $20,000 of the money so procured was applied by the said Butterfield and Jones to the purposes authorized by the plaintiff and by the said Gregory to fulfil the terms of the contracts of April 7, 1883, already referred to, $10,000 for the benefit of the plaintiff and $10,000 for the benefit of the said Gregory; that the remaining $5,000 was appropriated by the said Butterfield and Jones for their own purposes, and the plaintiff alleges that he has never received any part of said $5,000.

And the plaintiff shows that he received from Butterfield or Jones one of the notes for $20,334.60, and that the other note for $20,334.60 is the note now in the possession of the defendant Pike, to which note the plaintiff makes no claim; that the remaining note for $15,000 is also in the hands of the defendant Pike as hereinafter described.

That in this note the plaintiff alleges and claims that he has a one-half interest, and, as the note is due, that he is entitled to receive one-half of the proceeds of it from the defendant Swift, when paid.

And the plaintiff further shows that on or about Jan. 2, 1884, it was expressly agreed between the plaintiff and said Gregory that the plaintiff was entitled to one-half interest in said note for $15,000 and to one-half of the proceeds thereof in settlement of any and all claims that the plaintiff had against said Gregory arising from said sale of his shares of the capital stock of said Great Sierra Consolidated Silver Company.

And the plaintiff further shows that he is informed and believes that the said Butterfield entered into the contact, with the defendant Pike as set out in the said original bill of complaint of the

said Gregory against the said Pike and Swift, a copy of which is annexed to said bill, marked "Exhibit A," to which reference is made for a fuller statement thereof; and he further shows that the said Butterfield, acting in fraud of the plaintiff and in violation of the agreement made by him with the plaintiff regarding said notes of said Swift originally confided to him by the plaintiff as aforesaid and without the knowledge or consent of the plaintiff, undertook to deliver or pass over and did deliver and pass over to the said defendant Pike the said note for $15,000 of April 20, 1883, by way of pledge as collateral security for the payment of the sum of $25,000, which was part of the amount to be paid by him, the said Butterfield, to the said Pike under said contract made by him with the said Pike, dated July 31, 1883, and that the said defendant Pike knew that the said Butterfied had no authority from the plaintiff to deliver said note to him or to deliver the same to any person other than the plaintiff.

And the plaintiff further shows that he was not informed and did not learn that said Butterfield had attempted to pledge said note for $15,000 to the said Pike as aforesaid until after the same had been delivered over to the said Pike by the said Butterfield, namely, until some time in the month of October, 1883, and that the plaintiff has never assented or agreed in any way to the possession of the said note by the defendant Pike; that on or about Dec. 11, 1883, the plaintiff made demand upon the said Pike for the surrender and delivery up of the said note by an instrument dated Dec. 11, 1883, and signed by the plaintiff, which is annexed to the answer of the defendant Pike to the original bill of complaint and marked "A," to which reference is made, notifying the defendant Pike at the same time that he was the owner of an interest in said note for $15,000; that the plaintiff, moreover, on or about April 10, 1885, notified the defendant Swift that he claimed a one-half interest in the said note for $15,000 wrongfully attempted to be pledged by the said Butterfield or Jones to the said defendant Pike.

And the plaintiff further shows that he is informed and believes that the contract entered into by the said Butterfield with the defendant Pike, dated July 31, 1883, was never performed by either the said Butterfield or the said Pike, but was and has been for some time totally abandoned by both of them, and that the time within which the same was to be executed has long since expired, but that the said defendant Pike still wrongfully retains the said note of $15,000 and refuses to deliver the same to the plaintiff and has brought suit in this honorable court, in the name of said Jones, to whom the said note is made payable, against the defendant Swift to recover the amount thereof to his own use and has obtained judgment, and execution therein has been stayed to await the further order of the Court.

To the end, therefore, that the plaintiff may have that relief which

he can only obtain in a court of equity, and that process may issue to make said Butterfield, who is without the jurisdiction of this Honorable court, a party defendant to this bill of complaint if he should come within its jurisdiction, and that the defendants may answer the premises, but not under oath or affirmation, the benefit of which is expressly waived by the plaintiff, and that the said Pike may be compelled by decree of this honorable court to surrender the said note or instrument for $15,000 now in his possession to the plaintiff or some disinterested person appointed by this honorable court to receive and hold the same for the protection of the interests of the plaintiff and of the other persons interested therein, and that one-half of said note or instrument for $15,000 be decreed to be the property of and due to the plaintiff, and that the said defendant, Swift, be ordered to pay said one-half to the plaintiff and be enjoined from paying the said one-half to any other person whatever, and for such further relief as the nature of this case may require, and to your Honors may seem meet, may it please your Honors to grant unto the plaintiff a writ of subpœna to be directed to the said Charles A. Gregory, Francis A. Pike, William C. N. Swift, and to the said George W. Butterfield, if he should come within the jurisdiction of this honorable court, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true direct, and perfect answer make to all and singular the premises, and further, to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

JOHN C. KEMP VAN EE,
By WILLIAM F. WHARTON, *his Solicitor.*
WILLIAM F. WHARTON, *of Counsel.*

* * * * * * * * * * * *

[RECORD, PAGE 195.]

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

IN EQUITY.

JOHN C. KEMP VAN EE, *Complainant,*
v.
CHARLES A. GREGORY ET AL., *Defendants.*

ANSWER OF CHARLES A. GREGORY.

[FILED JULY 14, 1891.]

And now comes Charles A. Gregory, named as a defendant in the bill of complaint of the said Kemp Van Ee, not willingly, but in obedience to an order of this court passed in the above-entitled

cause July 11, 1891, requiring him to file an answer to the said bill entitled a cross bill in another cause formerly pending in this same court, in which the defendant was plaintiff and one Frederic A. Pike, a citizen of Maine, who died on the second day of December, 1886, was defendant, not hereby waiving or intending to waive his objection to said order as invalid for want of jurisdiction on the part of said court to pass the same and subject to such objection and to his right to urge the same, for answer to said so-called cross bill says he admits the allegation of the said Kemp that he is a citizen of the Kingdom of Great Britain, but he denies that said Kemp Van Ee is, or on the twenty-seventh day of November, 1886, was a defendant to the original bill of complaint of said Gregory against Frederic A. Pike and William C. N. Swift, and denies that said Kemp ever became lawfully entitled to file his said bill of complaint in this court as a cross-bill in the original cause aforesaid of Gregory *v.* Pike and Swift.

And this defendant says that if the bill of complaint of the said Kemp was ever duly and lawfully filed as a cross bill in the original cause aforesaid, yet that no subpœna or other legal process was ever served on Frederic A. Pike, of Calais, Me., named as one of the defendants therein, but called by mistake Francis A. Pike, and he says the said Pike was never lawfully made or became a party defendant to the said bill of complaint of said Kemp; and this defendant says that on or about the thirtieth day of November, A. D. 1886, he, said Gregory, and the said Pike entered into an agreement in writing for submitting the question of their respective titles to or in the said Swift notes to the determination of the Hon. E. R. Hoar as arbitrator, and that by reason of said submission, so entered into between them, the said original suit in equity brought against the said Pike by him was withdrawn from this court and settled and ceased to be pending as a cause between them in this court, and has not been a pending cause in this court at any time since the execution of the said submission and the delivery of the Swift notes to the said arbitrator in pursuance of said submission, with authority to him to pass over the said notes to whichever of the two he should find to be best entitled to the same; and this defendant says that this submission took effect and the said Swift notes, including the $15,000 note now claimed by the said Kemp in his cross bill, went out of the possession of said Pike and into the possession of the said arbitrator before the bill of complaint of the said Kemp had ripened into or become a suit against Pike and Swift and Butterfield, the defendants named therein, or either of them.

And this defendant shows that said bill of said Kemp was, viz., on the nineteenth day of October, 1889, dismissed as against the defendant Swift therein named, and, if still lawfully pending against any one, is not so pending against either the said Frederic A. Pike or the said Swift.

And this defendant, further answering, shows that it appears from the said bill of complaint as filed in this court Nov. 27, 1886, that the said Frederic A. Pike was a necessary party to the same, and yet he was never lawfully made a party to the same, but died at his home in Calais, Me., on the second day of December, 1886, without having become a party defendant to said bill; and this defendant says that by reason of said Pike's death, as aforesaid, his interest in the said $15,000 Swift note (claimed by the said Kemp) became devolved on or transmitted to his, the said Pike's legal representatives, and that they reside in the State of Maine, and that they became necessary parties to said Kemp's bill of complaint in the place or stead of the said Frederic A. Pike, named or intended to be named in the said bill, and that the said legal representatives have not been made parties to said bill of complaint of said Kemp and cannot be made or joined as such parties by reason of their residing beyond the jurisdiction of this court or the reach of its process.

And this defendant, under and by virtue of the provisions of the fifty-second rule of practice for the courts of equity of the United States, suggests to the court that by reason of this state of things the said Kemp's bill of complaint is defective for want of parties. And as to the allegations of the complainant in his said bill of complaint relating to his, the said Kemp's dealings with one George W. Butterfield and the doings of the said Butterfield this defendant is ignorant and cannot admit or deny the same, but requires proof thereof if material; but this defendant does deny that the said Kemp was at the time of filing his bill the rightful owner of the said $15,000 Swift note or of any part thereof, as alleged by him.

And this defendant denies that the said Kemp, on or about the eleventh day of December, 1883, or at any other time, demanded of the said Pike the surrender and delivery of the said $15,000 Swift note, as alleged by him in his said bill of complaint.

By his Solicitor,

F. A. BROOKS,

who signs this answer, saving and reserving to said Gregory his exceptions to the order of court requiring him to answer, as hereinabove stated and reserved.

* * * * * * * * * * *

[RECORD, PAGE 246.]

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2170.

CHARLES A. GREGORY *v.* FREDERIC A. PIKE ET AL.

FINAL DECREE.

MARCH 8, 1894.

COLT, J. This cause came on to be further heard at this October term, 1893, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That from the fund in the registry of the court in this cause there be paid to the clerk of this court, as required by law in such case, one per cent. upon the whole of said fund.

2. That there be paid from said fund to the administrator of the defendant Swift, deceased, costs, to be duly taxed in favor of said defendant.

3. That for special services in connection with said fund, as set forth in his petition, there be paid to John G. Stetson the sum of eight hundred dollars.

4. That there be paid to the defendant John C. Kemp Van Ee one-half of the proceeds of the fifteen thousand-dollar note, with the accumulations thereon.

5. That there be paid to Mary H. Pike, executrix of the original defendant, Frederic A. Pike, since deceased, the sum of twenty-five thousand dollars, with interest thereon from Jan. 1, 1884, if the fund remaining in the registry of the court shall be sufficient for the payment, and if not sufficient the balance of said fund.

6. That the cross bill of the defendant George W. Butterfield be dismissed.

7. That after the payments hereinbefore decreed to be made to said clerk, the administrator of Swift and Stetson, and the amounts decreed to be paid to Kemp and Pike, as hereinbefore provided, the remainder of the fund, if any, be paid to the plaintiff, Charles A. Gregory.

By the Court,
BENJ. H. BRADLEE,
Deputy Clerk.

* * * * * * * * * * *

[Record, Page 275.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

October Term, 1894.

No. 99.

Charles A. Gregory, *Appellant*,

v.

John C. Kemp Van Ee, *Appellee*.

[Before Putnam, Webb and Carpenter, JJ.]

FINAL DECREE.

January 31, 1895.

This cause came on to be heard Oct. 25 and 26, 1894, on the transcript of record from the Circuit Court of the United States for the district of Massachusetts, with —

No. 98.

Charles A. Gregory, *Appellant*,

v.

Mary H. Pike, *Appellee*,

No. 100.

Thomas H. Talbot, *Appellant*,

v.

Mary H. Pike, Ex'x, et al., *Appellees*,

No. 101.

George W. Butterfield, *Appellant*,

v.

Charles A. Gregory et al., *Appellees*,

on separate appeals, and was argued by counsel.

On consideration whereof it is now, to wit, Jan. 31, 1895, ordered that Thomas H. Talbot, attorney for Mary H. Pike, executrix, recover the amount for services asked for in his intervening petition; that the amount so recovered rank as explained in the opinion filed this day in this case; that the cross bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*; that Mary H. Pike, executrix, recover her costs against Gregory in this court and in the Circuit Court; that Gregory recover his several costs against Butterfield and Kemp Van Ee on their cross bills, both in this court and in the Circuit Court; that no other costs be recovered

in either court except as expressly stated in the decree entered in the Circuit Court March eighth, eighteen hundred and ninety-four; that Mary H. Pike, executrix, and Kemp Van Ee be allowed respectively accumulations and interest to the time of the entry of the final decree on the rules applied to him or her in said decree entered said March eighth, and that the case be remanded to the Circuit Court, with directions to enter a final decree conforming to this order so far as it goes and in all other respects to said decree entered March eighth, eighteen hundred and ninety-four.

By the Court,

JOHN G. STETSON, *Clerk.*

* * * * * * * * * *

UNITED STATES OF AMERICA.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, ss.

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts, GREETING:

Whereas, lately in the United States Circuit Court of Appeals for the First Circuit, in a cause between Charles A. Gregory, Appellant, and John C. Kemp Van Ee, Appellee, No. 99, wherein a decree of the said United States Circuit Court of Appeals entered in said cause on the thirty-first day of January, A. D. 1895, is in the following words, viz.: —

[Then follows a copy of the decree of the Circuit Court of Appeals, printed page , *supra*].

As by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of an appeal taken by Charles A. Gregory agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord eighteen hundred and ninety-five, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and on a motion to dismiss which was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this court that this appeal be, and the same is hereby dismissed for the want of jurisdiction; and that the said appellee John C. Kemp Van Ee recover against the said appellant $63.53 for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the Circuit Court of the United States for the District of Massachusetts.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2170.

CHARLES A. GREGORY *v.* FREDERIC A. PIKE, ET AL.

FINAL DECREE.

JUNE 20, 1896.

It appearing to the Court that after proceedings duly had upon the several appeals which were taken from the decree of this court entered March 8, 1894, in this cause, three mandates from the Supreme Court have been received in the Clerk's office of this court, copies of which mandates are hereto annexed and made a part of this decree, and it further appearing that upon each of said several appeals, after hearing and decision thereon in the United States Circuit Court of Appeals for the first circuit, a mandate from said United States Circuit Court of Appeals has been received in the Clerk's office of this court, all of said mandates from said United States Circuit Court of Appeals being in the same form, and a copy thereof being hereto annexed, and made a part of this decree, it is now, to wit, June, 1896, ordered that said mandates of the Supreme Court and of the United States Circuit Court of Appeals for the first circuit be recorded, and

It is ordered, adjudged and decreed in conformity with the said mandates of the Supreme Court and of the United States Circuit Court of Appeals, as follows:

1. That from the fund in the registry of this court in this cause, amounting to $50,131.85 there be paid to the Clerk of this court, as required by law in such case, one per cent. upon the whole of said fund, said one per cent. amounting to $501.31.

2. That there be paid from said fund to the administrator of the defendant Swift, deceased, costs taxed at $113.12.

3. That for special services in connection with said fund as set forth in this petition, there be paid to John G. Stetson the sum of $800.

4. That there be paid to the defendant, John C. Kemp Van Ee one-half the proceeds of the fifteen thousand-dollar note with the accumulations thereon to the date of this decree, amounting to $9,439.98.

5. That the remainder of the fund being less than the sum of

$25,000 with interest thereon from Jan. 1, 1884, to the date of this decree, be paid to Mary H. Pike, executrix of the original defendant, Frederic A. Pike, since deceased.

6. That the payments hereinbefore decreed shall be made in the order of preference in which they are numbered, and that after the same shall be made, there being no sum remaining, no payment shall be made to Thomas H. Talbot, under the opinion and order of the Circuit Court of Appeals, and no payment shall be made to the complainant, Charles A. Gregory under paragraph 7 of the decree of this court of March 8, 1894.

7. That the cross bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*.

8. That the cross bill of the defendant George W. Butterfield be dismissed.

10. That executions issue for costs as ordered in the several mandates of the Supreme Court, and the Circuit Court of Appeals for the first circuit, as follows, to wit:

In favor of Mary H. Pike, executrix, against the said Charles A. Gregory for the sum of dollars and cents costs.

In favor of said Charles A. Gregory against the said George W. Butterfield for the sum of dollars and cents costs.

In favor of said Charles A. Gregory against the said Kemp Van Ee for the sum of dollars and cents costs.

By the Court,

ALEX. H. TROWBRIDGE, *Clerk*.

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts.

May Term of 1896.

In Equity, No. 737.

Charles A. Gregory *v.* Frederic A. Pike et al.

ASSIGNMENT OF ERRORS.

And now on the twenty-second day of July, 1896, comes Charles A. Gregory, plaintiff, in the above-entitled cause, and says that the decree in said cause made and entered June 20, 1896, or so much thereof as relates to John C. Kemp Van Ee is erroneous and against the rights of said Gregory for the following reasons: —

Because from the pleadings and evidence in said cause it appears that said Kemp Van Ee was born in the State of New Jersey, and

presumptively is a citizen of the State of New Jersey; and the said Gregory at the time of the commencement of said suit was and now is a citizen of the State of Illinois, so that neither of them could lawfully litigate with each other in the United States Circuit Court for the District of Massachusetts.

And because the said Circuit Court, at the time of entering this decree of June 20, 1896, in said cause in favor of the said Kemp Van Ee and against the said Gregory, did not have any jurisdictional power or authority to enter the said decree in favor of the said Kemp Van Ee, or any decree whatever, in said cause when treated as pending between said Gregory and said Kemp Van Ee.

By his Solicitor,

F. A. BROOKS.

60-643 164-123

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 591.

CHARLES A. GREGORY, Appellant,

v.

JOHN C. KEMP VAN EE, Appellee.

1. Answer of Appellant to Motion for Dismissal of Appeal.

2. Brief for Appellant in Opposition to Motion of Dismissal.

F. A. BROOKS,

Solicitor and of Counsel for the Appellant.

1. Answer of Appellant to Motion for Dismissal of Appeal

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 591.

CHARLES A. GREGORY, *Appellant*,

v.

JOHN C. KEMP VAN EE.

ANSWER OF THE APPELLANT GREGORY TO THE MOTION OF THE APPELLEE FOR DISMISSAL OF THE APPEAL.

I.

And now comes the appellant above named, and for answer to the motion of the appellee for the dismissal of his appeal says: That it is not true, as stated by the appellee in his motion, that "it appears by the record" that the cause in which said appeal is taken was originally brought by said Gregory, a citizen of Illinois, in the State Court of Massachusetts, against F. A. Pike, a citizen of Maine, and W. C. N. Swift, a citizen of Massachusetts, and thence removed to the United States Circuit Court for said District of Massachusetts, upon the ground of the diverse citizenship of the parties; that it is not true, as stated in said motion, that said Kemp Van Ee was, by order of Court, made a party defendant to said suit of Gregory *v.* Pike and Swift, unless that result was produced by an order of the Court below passed Jan. 22d, 1886, and having no legal validity.

This respondent admits that on the 11th day of December, 1885, a motion was made in old equity cause 2170 to the Court below by W. C. N. Swift, one of the defendants, to said equity cause of Gregory *v.* Pike *et al.*, referred to in said motion to the effect that said Court would order J. C. Kemp Van Ee to be made a party defendant to said equity cause of Gregory *v.* Pike and Swift, and

that on the 22d day of January, 1886, the Court below made an order in said equity cause granting said motion, and to the effect that Kemp Van Ee be made a defendant to said cause. But this respondent avers that said order was not lawful and valid and did not operate to make said Kemp Van Ee a party to said cause; and that the Circuit Court of Appeals in its decree of Jan. 31st, 1895, referred to in this motion to dismiss and in its opinion accompanying said decree, held and determined that said order of the Court below was invalid and without any force or avail in law.

Said Kemp Van Ee, however, assumed to have been lawfully made a defendant to the bill of complaint of said Gregory, and appeared in the court below by his counsel on the 13th day of March, 1886, and there filed a paper purporting to be an answer by him to the bill of complaint of said Gregory, a copy of which as filed in court March 13th, 1886, is printed at pages 12 to 15 of the record furnished by the appellee for the hearing of this motion to dismiss appeal. But on the 30th day of June, 1886, Pike appeared in said cause in the Court below, and represented that the prayer of said Kemp for relief, as set up in the last sentence or closing paragraph of Kemp's answer, was improper as a prayer in the answer of a co-defendant and otherwise, and he moved said Court that said prayer be stricken out of the answer of said Kemp. The Court below heard the motion of said Pike, and on the 27th day of October, 1886, filed a rescript thereon in the words following, to wit: —

RESCRIPT.

COLT, J. "Motion (No. 1) of defendant Pike for correction of answer of defendant Kemp is granted. The relief here sought must be by cross bill."

In conformity with the said order of Court or Rescript of Oct. 27th, 1886, Kemp filed a paper in the words following in said equity cause 2170.

"And the defendant, J. C. Kemp Van Ee, in conformity with the order of this Honorable Court, made Oct. 27th, 1886, in that regard, hereby files an amendment to his answer filed March 13th, 1886, by striking out the final paragraph of said answer.

J. C. KEMP VAN EE,
by WILLIAM F. WHARTON, *his Solicitor.*"

II.

At the same time that Kemp struck out of his so-called answer to Gregory's bill of complaint the prayer for relief, as required by the order of Court of Oct. 27th, 1886, he applied to the Court below for leave to bring a cross bill in order, by that mode of proceeding, to obtain the relief which the Court stated could not be had by him under the prayer of relief inserted in his answer and stricken from said answer as aforesaid upon Pike's motion of June 30th, 1886.

Having afterward obtained leave of Court to bring a cross bill in said old cause, Kemp, on the 27th day of November, 1886, filed in the clerk's office of the Court the bill of complaint, a copy of which is printed at pages 15 to 19 of the record.

In his answer of March 13th, 1886, Kemp had prayed that the "defendant Swift be ordered to pay said one half (of note) to this defendant [himself], and be enjoined from paying the same to any other person whatever." In that answer he prayed no relief as against Pike. In this bill of complaint, called a cross bill, he prayed that "Pike may be compelled . . . to surrender the said note, *now in his possession*, to the plaintiff" (himself), or some disinterested person appointed by the Court to receive and hold the same; and he also prayed for the same relief against Swift as had been prayed for by him in that part of his answer stricken out by order of the Court.

Though Kemp's bill was filed in the Clerk's Office, Nov. 27th, 1886, yet no subpœna was issued thereon until Dec. 6th, 1886, and in the meantime Pike had died at his home in Maine, so that said bill of complaint never took effect as to Pike, and did take effect only as against Swift, Gregory and Butterfield, upon whom service was made as defendants to the same, and no relief was prayed in said bill against either of these three persons but Swift.

Kemp's bill of complaint as well as Gregory's bill of complaint in 2170, were both dismissed as to Swift by the Court below, by an order passed Oct. 19th, 1889.

Gregory's bill of complaint (2170) was also dismissed as against said Kemp Van Ee by an order of Court passed Nov. 21st, 1891, upon the motion of Kemp himself, so that the old equity cause of Gregory and Pike (deceased) was not pending in the Court below,

either as between Gregory and Kemp Van Ee, or Gregory and Swift, at any time after Nov. 21st, 1891.

(The old cause was also dismissed Nov. 21st, 1891, as against Butterfield.)

The old equity cause of Gregory against Pike and Swift, as well as against Kemp and Butterfield (if they were parties to it), had therefore come to an end as early as Nov. 21st, 1891, and, as this respondent is advised, could no longer serve as a basis for the exercise by the Court below of any jurisdiction as between the persons above named, or any of them, for any purpose whatever.

Kemp's cross bill, however, remained pending in Court as between said Kemp as plaintiff and Gregory and Butterfield as defendants, after Nov. 21st, 1891.

That bill had been entered in Court and docketed under the same number (2170) as the old cause of Gregory and Pike, and all proceedings therein had been entered on the docket as taking place in that old cause, and the same course was pursued by the clerk after the old cause itself had been disposed of as above set forth in November, 1891.

As the cross suit of Kemp Van Ee had not taken effect as against the said Pike by reason of his decease before the issue of the process of subpœna, and as no relief had been sought or prayed for therein as against this respondent Gregory, he did not deem it necessary to appear or to pay any attention to the same for several years, and he did not so appear. But on the 1st day of November, 1890, this respondent did appear and filed a demurrer to said bill of complaint.

One of the causes of demurrer to said bill of complaint then assigned by him was assigned in these words: —

"Also that it appears by said bill that said suit is brought by the plaintiff (Kemp Van Ee) to recover the contents of a certain promissory note of $15,000, dated April 20th, 1883, made by one Wm. C. N. Swift, and payable two years after date to one Charles F. Jones and not to the plaintiff, so that no suit could be commenced or prosecuted by the plaintiff in this Court to recover the contents of said note except as an assignee of the said Jones."

This demurrer was heard by the Court and overruled Jan. 24th, 1891, and an order of Court passed to that effect.

This respondent then (Feb. 14th, 1891) filed a plea to said bill of complaint. Said plea was set down for argument, and heard by the Court July 11th, 1891, and on the same day the Court overruled said plea and ordered this respondent to make answer to said bill of complaint within one week from that day.

Thereupon, on the 14th day of July, 1891, the said Gregory made and filed his answer to said bill. The answer so filed by him is printed at page 12 of the record, and begins as follows: —

"And now comes Charles A. Gregory, named as a defendant in the bill of complaint of said Kemp Van Ee, not willingly, but in obedience to an order of this Court passed in the above-entitled cause (John C. Kemp Van Ee, complainant, *v.* Charles A. Gregory *et al.*, defendants) July 11th, 1891, requiring him to file an answer to the said bill, entitled a cross bill in another cause formerly pending in this same Court in which this defendant was plaintiff and one Frederic A. Pike, . . . who died on the 2d day of December, 1886, was defendant, not hereby waiving or intending to waive his objection to said order as invalid for want of jurisdiction on the part of said Court to pass the same."

Replication was filed by Kemp to Gregory's answer, July 18th, 1891, and then for the first time were Kemp and Gregory at issue under this bill of Kemp Van Ee, styled a cross bill in old cause 2170.

Upon the 9th day of December, 1891, or about eighteen days after Gregory's old bill of complaint had been dismissed, as against Kemp on Kemp's own motion, Kemp applied to the Court below by a motion entitled in the old cause of Gregory *v.* Pike for an order granting him an extension of time in which to take testimony under his so-called cross bill, in view of the answer filed thereto by Gregory July 14th, 1891, and the issue joined on said answer July 18th, 1891, as above. Gregory's answer was entitled in the cause of Kemp Van Ee, complainant, *v.* Gregory *et al.*, defendants.

This motion was granted, and three months' time was given to Kemp in which to take evidence on the "*cross bill*" of Van Ee, plaintiff, against Gregory *et al.*

Pursuant to the leave given Kemp to take evidence in support of his bill of complaint, he proceeded to take evidence, and said cause (Kemp Van Ee *v.* Gregory) was brought to a final hearing in the court below June 30th, 1893, in connection with and as part and

parcel of the old equity cause of Gregory *v.* Pike *et al.*, treated by the court below as still pending and as including Kemp Van Ee as a party thereto, and a final decree entitled in said original cause, Gregory *v.* Pike *et al.*, was entered March 8th, 1894, in favor of Kemp, in and by which decree Kemp was to be paid "*one half of the proceeds of the fifteen-thousand-dollar note, with the accumulations thereon.*"

From that decree, or so much thereof as related to and was in favor of the said Kemp Van Ee, this respondent took an appeal to the Circuit Court of Appeals, entitled in the cause of John C. Kemp Van Ee against Charles A. Gregory *et al.*, and not in the cause No. 2170 of Gregory *v.* Pike *et al.* Said appeal was duly entered and docketed in said Court of Appeals as cause No. 99 on the calendar of that court entitled Gregory, appellant, *v.* Kemp Van Ee, appellee, and said appeal was heard by said Court of Appeals; and said Court of Appeals determined and decreed that said bill of complaint of said Kemp Van Ee be dismissed with costs to this respondent.

This respondent in his appeal from said decree of March 8th, 1894, to the Circuit Court of Appeals of the First Circuit, assigned errors in said decree, as follows to wit: —

"Because this Court in and by its decree . . . has admitted or recognized John C. Kemp Van Ee as a party to said cause and has declared and held him to be entitled to litigate therein as a party defendant to said cause as fully as if he had been joined as a defendant thereto by and with the consent of the plaintiff; and has determined and decreed that said Kemp Van Ee is entitled to be paid a certain sum from or out of moneys said to be subject to the disposal of the Court, among or between the . . . parties to the above-entitled cause of Gregory against Frederic A. Pike, and another, being equity cause No. 2170, etc.

"Because . . . it appears that the plaintiff Gregory was a citizen . . . of Illinois, and that . . . Kemp Van Ee was born in the State of New Jersey, and was not made a party defendant to the plaintiff's bill of complaint, and was not found in this district or served with process in this cause as such defendant, so that this Court never had or could by law have or exercise any jurisdiction of said cause, as between the said Gregory and the said Kemp Van Ee, . . . and consequently . . . could not lawfully make or enter any decree whatever in said cause in favor of the said Kemp Van Ee as a party to the above-entitled cause, for want of jurisdiction as between the plaintiff and the said Kemp Van Ee. And the said Gregory submits

the following . . . statement or specification . . . of certain orders or rulings of the Court in said cause prior to the entry of the final decree to which exceptions are taken by him as erroneous. . . .

"1. The order of Court made Jan. 22d, 1886, granting the petition of John C. Kemp Van Ee for making him a party defendant to the above entitled cause.

"2. The order of the Court passed Jan. 22d, 1886, granting the motion of W. C. N. Swift for making John C. Kemp Van Ee a party defendant to said cause.

"3. The order of Court passed Nov. 27th, 1886, granting Kemp Van Ee leave to file a bill of complaint, called by him a cross bill, in the cause of Gregory against Pike and Swift. . . .

"7. The order of Court of Jan. 24th, 1891, overruling the demurrer of Gregory filed Nov. 1st, 1890, to the bill of complaint of John C. Kemp Van Ee.

"8. The order of Court passed July 11th, 1891, overruling the plea of Gregory to the bill of John C. Kemp Van Ee."

The Circuit Court of Appeals, in its opinion filed with its decree of Jan. 31st, 1895, in said appeal cause (No. 99), remarked with reference to said supposed cross bill of Kemp Van Ee, and the order of the Court below making Kemp Van Ee a party to said old cause, as follows: —

"As to the proceedings by which Kemp Van Ee was made a defendant in Gregory's bill and permitted to file a cross bill, Swift, who was a defendant, petitioned that Kemp Van Ee should be made a defendant, and Kemp Van Ee also petitioned to be made defendant, and both petitions were allowed, so that he properly stands as a defendant, if he could be made such, either on the petition of Swift or on his own. . . .

"In the way attempted in the present case, there are no pleadings on behalf of the original plaintiff as against Kemp Van Ee, and could be none. The whole basis of making him a party defendant was in the allegations of Swift's answer. . . .

"It is true that in the case at bar, if Kemp Van Ee was properly made a party, he was able to file a cross bill; so that, although the original bill was dismissed as to the new defendant, bringing him in would not necessarily fail of results. We must, however, judge of the question by general rules, applicable to suits where there would be no basis for filing cross bills. . . .

"As Kemp Van Ee was improperly made a defendant, it follows that his cross bill was unauthorized and should be dismissed. . . ."

The Court of Appeals accordingly, in its decree of Jan. 31st, 1895, and by its mandate of April 15th, 1896, ordered the Court below to dismiss said cross bill with costs.

That ruling and decree of the Circuit Court of Appeals to the effect that Kemp Van Ee had not been made a party to the old cause of Gregory and Pike, and had acquired no lawful right to bring and prosecute a cross bill in said cause, and that said cross bill should be dismissed with costs to Gregory, was understood by this respondent as a final determination that said cross bill had never been lawfully pending as a cross bill in said old cause, and that said Kemp Van Ee had acquired thereby no right to litigate with said Gregory in said old cause for any purpose whatever.

But while the Circuit Court of Appeals had thus decided that Kemp Van Ee's said bill of complaint, styled a cross bill, was not a proper cross bill in said old cause, and that said Kemp Van Ee was not, and never was, a party to said old cause, or capable of litigating therein as such party, and that said so-called cross bill should be dismissed with costs to Gregory, yet it saw fit also to declare, determine and decree at the same time that the said so-called cross bill of Kemp Van Ee "stand as a petition *pro interesse suo*" filed by said Kemp Van Ee in said old cause, and that he have the same benefit thereof as he might have had, if said bill of complaint had been originally filed by him as an intervening petition in said old cause, and as he could have had in case said bill of complaint had been filed in the Court below as an intervening petition, and has sustained as such by said Court.

In pursuance of that decree of Jan. 31st, 1895, said Circuit Court of Appeals afterward, to wit, on the 15th day of April, 1896, issued its mandate to the Circuit Court in and by which mandate it directed that the "*cross bill of Kemp Van Ee stand as an intervening petition pro interresse suo*," meaning thereby that Kemp Van Ee's bill of complaint, styled a cross bill in the old cause, should be treated by the Court below in all respects as if it had been filed originally in said old cause of Gregory and Pike, not as and for a cross bill in said old cause, but as a petition of intervention *pro interresse suo* in said old cause, and in that aspect of said bill of complaint that the Court below should afford to said Kemp Van Ee precisely the same relief which it had by its decree of March 8th,

1894, accorded to him as plaintiff in said bill of complaint when treated as a cross bill in said old cause.

This mandate of the Circuit Court of Appeals was made in appeal cause No. 99 of Gregory, appellant, against Kemp Van Ee, appellee, and was transmitted to the Circuit Court and made matter of record therein May 11th, 1896.

Subsequently, on the 20th day of June, 1896, the said cause of John C. Kemp Van Ee, complainant in said bill of complaint, filed Nov. 27th, 1886, against Charles A. Gregory *et al.*, came on again for final hearing in the Court below, and the Circuit Court thereupon made and entered its decree entitled in the old equity cause of Charles A. Gregory against Frederic A. Pike *et al.*, in and by which it ordered, adjudged and decreed among other things, "*that the cross bill of Kemp Van Ee stand as* an intervening petition *pro interesse suo*, and that there be paid to the said Kemp Van Ee one half of the proceeds of the fifteen-thousand-dollar note with accumulations thereon and interest from March 8th, 1894, to the present date, amounting to $9,439.98."

From this decree of the Circuit Court so made and entered June 20th, 1896, as aforesaid, or from so much thereof as related to and was in favor of the said Kemp Van Ee, this respondent was allowed to take, and did take, and perfect the appeal now before the Supreme Court of the United States, and did duly assign errors in said decree and take out a citation to the said Kemp Van Ee, appellee, as by law required, and did cause the said appeal to be entered in this Honorable Court with a transcript of the record of proceedings had in the Court below in the cause in which the said appeal was taken. And the error so assigned by this respondent to said decree of June 20th, 1896, was that the said Circuit Court was without jurisdiction to make and enter the said decree of June 20th, 1896, meaning thereby so much of said decree of June 20th, 1896, as related solely to Kemp Van Ee and as was in these words: —

"It is ordered adjudged and decreed . . . that the cross bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*," . . . and that there be paid to . . . "John C. Kemp Van Ee one half of the proceeds of the $15,000 note with the accumulations thereon and interest from March 8th, 1894, to the present date (June 20th, 1896), amounting to $9,439.98."

In the motion of the appellee for the dismissal of this appeal it is stated as follows: —

"that Kemp Van Ee . . . was by order of Court made a party defendant to the suit (old equity cause of Gregory *v.* Pike *et al.*), and filed his cross bill; that said cause was heard and determined in said Circuit Court and upon due appeal to the Circuit Court of Appeals for the first circuit was by said last mentioned Court determined by its decree dated Jan. 31st, 1895, whereby the cross bill of said Kemp Van Ee was ordered to stand as an intervening petition *pro interesse suo*. From that decree said Gregory brought to this Court an appeal which was dismissed for want of jurisdiction; thereupon the Circuit Court made a final decree in accordance with the mandates of this Court and the Circuit Court of Appeals, and from that decree (June 20th, 1896), Gregory has brought this appeal."

It is not true, as represented by the appellee in his motion to dismiss this appeal, that the final decree of June 20th, 1896, was in accordance with the mandates of this Court in regard to Kemp Van Ee or had anything to do with the action taken by this Court in appeal cause No. 601, on the docket of this Court at its October Term, 1895.

The mandate of this Court in Cause No. 601 (October Term, 1895) was that said appeal (601) be dismissed with costs to appellee for want of jurisdiction, meaning thereby (as this respondent supposes) that the Supreme Court had no jurisdiction to entertain the appeal which had been taken by him from the decree of said Circuit Court of Appeals and that alone. This Court did not, in its mandate dismissing that appeal, give any instructions to the Circuit Court how to proceed in the appeal cause.

The Circuit Court in March, 1894, had decreed in 2170 that Van Ee, in his capacity of *defendant* to Gregory's original bill of complaint (2170), was entitled to maintain the bill of complaint brought by him and styled a cross bill, and that, as such defendant to the old bill of Gregory, and as plaintiff in the cross bill, he was entitled to recover and receive in said old Equity cause 2170 one half of the amount of the fifteen thousand-dollar Swift note, in his said cross bill mentioned.

From this decree of March 8th, 1894, Gregory had appealed to the Circuit Court of Appeals, and had assigned it as the error of said

Circuit Court in its said decree that it had no jurisdiction to make such a decree in favor of Kemp Van Ee in said old Equity cause, or the cause of Kemp Van Ee, complainant, against him.

The contention of Gregory in the Circuit Court had been that Van Ee was not a party to old cause 2170, that not having been a party defendant to that old cause he could not lawfully bring and prosecute a cross bill in said old cause, and his contention in the Circuit Court of Appeals was that the decree of said Circuit Court "*that there be paid to the defendant*" John C. Kemp Van Ee one half of the proceeds of "the $15,000 note" was erroneous, because if said Van Ee was not a party defendant to old cause 2170, and was not entitled to prosecute his bill as a cross bill therein, then he had no standing whatever as a party to old cause 2170, and the Circuit Court had no jurisdiction for making a decree in his favor, either as a party to said old cause, or as plaintiff in the bill of complaint brought by him, whether said bill were taken to be a cross bill in said old cause, or a new and original bill of complaint disconnected with said old cause.

While the Circuit Court of Appeals ordered the dismissal of Kemp Van Ee's bill of complaint with costs to Gregory, at the same time it ordered by its mandate that said cross bill stand as an intervening petition in said Equity cause 2170, and in that aspect of said cross bill it directed said Circuit Court to afford said Kemp Van Ee the same relief and award him the same amount which had been awarded him by said Circuit Court in its decree of March 8th, 1894.

This mandate of the Circuit Court of Appeals was not issued till April 15th, 1896; it was not filed or made matter of record in said Circuit Court until May 11th, 1896, and no action was taken under it by the Circuit Court until June 20th, 1896. Then, for the first time, the Circuit Court, in obedience to said mandate, made its second final decree as to Kemp Van Ee as follows; to wit: "*that Van Ee's cross bill stand as an intervening petition in said old cause* (2170) *and that there be paid to him one half the proceeds of the* 15,000 *Swift note*," amounting at that time to $9,439.98.

By this new decree of June 20th, 1896, the Circuit Court had, in obedience to the mandate of the Court of Appeals, undertaken to give Kemp Van Ee a standing as litigant in the old cause of Greg-

ory and Pike in the character of an intervening petitioner in said old cause, and had awarded him as such petitioner the sum of $9,439.98.

The $15,000 Swift note referred to in Van Ee's bill of complaint was in these words: —

$15,000— NEW BEDFORD, 4mo. 20th, 1883.

Two years after date for value received I promise to pay Charles F. Jones fifteen thousand dollars with interest at six per cent per annum. (Signed) W. C. N. SWIFT.

In his bill of complaint the said Van Ee alleges and claims that "he has a one-half interest in this note, and as the note is due that he is entitled to receive one half of the proceeds of it from the defendant Swift when paid and that it had been previously, viz., Jany. 2d, 1884, expressly agreed between him and the said Gregory that he, Van Ee, was entitled to one-half interest in said note . . . and to one-half the proceeds thereof in settlement of any and all claims that the plaintiff (Van Ee) had against said Gregory arising from said sale of his shares of the capital stock of said Great Sierra Consolidated Silver Company."

The said Van Ee thereupon in his said bill of complaint prayed relief as follows, to wit: —

"That one half of said note of instrument for $15,000 be decreed to be the property of and due to the plaintiff (himself) and that the *said defendant Swift be ordered to pay said one half to the plaintiff* and be enjoined from paying the said one half to any other person whatever."

The $15,000 Swift note here referred to was payable to Charles F. Jones (not negotiable), and was alleged to have been in the possession of Frederic A. Pike, of Maine, who was not made a party to Kemp's bill of complaint. The only prayer of relief against any person who had been made a party to Kemp's suit was the prayer

"*that the said defendant Swift be ordered to pay said one half*" (of said note) "*to the plaintiff*, and be enjoined from paying the said one half to any other person whatever."

CHARLES A. GREGORY.

I, Charles A. Gregory, have read the foregoing answer by me subscribed, and the facts therein stated are true to the best of my knowledge, information and belief.

CHARLES A. GREGORY.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

Subscribed and sworn to before me this fifth day of November, 1896.

[SEAL]

WILLIAM G. WAITT,
Notary Public.

2. Brief for Appellant in Opposition to Motion of Dismissal

Supreme Court of the United States,

OCTOBER TERM, 1896.

CHARLES A. GREGORY, *Appellant*,

v.

JOHN C. KEMP VAN EE, *Appellee*.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF APPELLEE FOR A DISMISSAL OF THE APPEAL.

I.

The counsel for the appellee, in the motion to dismiss, and in his brief, proceeds upon the assumption or theory, that the cause in which his appeal was taken was a branch or dependency of the old equity, cause of Gregory against Pike and Swift (No. 2170 in the Court below), and that the Circuit Court of Appeals had so determined in its decree of Jan. 31st, 1895.

The appellee has printed for this hearing just enough of the appeal record to give color to that view of the case.

In order to counteract such an impression, the appellant has made answer to the motion to dismiss, verified by oath, and has in that way brought to the attention of the Court certain portions of the transcript of record not furnished by the appellee, and calculated, in his judgment, to show that the motion to dismiss is based upon a misconception or an erroneous statement as to the facts.

In the brief of the counsel for the appellee he seems to consider this appeal as presenting the same question as was presented by the appeal taken by this same appellant from the decree made by the Court below in March, 1894, nothwithstanding the conceded fact that the decree of June 20th, 1896, now appealed from, is based, as regards the appellee, Kemp, upon an entirely different theory as to

the relation sustained by Kemp as a party to the litigation from that declared to exist in the decree of March 8th, 1894. The counsel for the appellee either ignores or fails to perceive and recognize the difference between the two decrees in this respect, and goes so far as to cite the opinion of the Circuit Court of Appeals, in its discussion of the former appeal, as if it were pertinent or should be regarded as an authority upon the question of jurisdiction raised by this appellant in his appeal from the decree of 1896. As the two decrees differ materially in regard to the position or relation sustained by Kemp Van Ee to the old cause of Gregory and Pike, and as there is no reason to suppose that the appeal records, never printed in full in either case, are the same, we fail to see how this Court can be guided in its determination of this appeal by anything said by the Circuit Court of Appeals in discussing the former appeal.

II.

The question presented to this Court by the appellant in this case is whether it was within the jurisdiction of the Circuit Court to make that part of the decree of June 20, 1896, which relates to Kemp Van Ee, by or under which he is awarded the sum of $9,439.98.

This decree (Rec., p. 26, §7) provides

"that the cross bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*, and that there be paid to the defendant, John C. Kemp Van Ee, one half of the proceeds of the fifteen thousand dollar note" . . . amounting to $9,439.98.

This decree purports to have been made in the old equity cause entitled Charles A. Gregory *v.* Frederic A. Pike *et al.* (2170), and it directs that said sum, $9,439.98, be paid to Kemp Van Ee as a "DEFENDANT" in the said equity cause.

We submit that the Court below had no lawful power to award the said money to Kemp Van Ee, because it appears from the answer of this appellant, that the bill of complaint in Gregory *v.* Pike was dismissed as to Kemp Van Ee, Nov. 21st, 1891 (p. 3, answer), upon Kemp's own motion, and consequently that the Court below thereafter had no jurisdictional power whatever to enter any

decree in favor of said Kemp Van Ee in said suit. This rule of the law of procedure is recognized and stated by the Circuit Court of Appeals in its opinion in the former appeal cause, No. 99 (67 Fed. Rep. 845), where that Court used this language: —

"The result which may come from bringing in a defendant, as was done in this case, shows the impropriety of it. 'A defendant, thus brought in, answers, and complainant refuses to file a replication. The only remedy is for the defendant to move a dismissal as against himself. The result is that he is dismissed from the case, and the case stands exactly as it did before he was brought in.'"

Here we have the express declaration of the Court of Appeals, that after the dismissal of the old cause 2170 as against Kemp Van Ee, that old cause stood exactly as it did before Kemp was brought into it.

Again, after the dismissal of Gregory's bill of complaint or suit as against Kemp Van Ee, he (Kemp) sustained no relation to said old suit except that of plaintiff in the bill of complaint brought by him and styled a cross bill in said old cause, and the Circuit Court of Appeals ruled and held that Kemp Van Ee had no lawful right to bring and prosecute said bill of complaint as a cross bill in that old cause, and ordered said bill to be dismissed, with costs to Gregory. (Answer of Gregory p. 7.)

It thus appears, as we respectfully submit, that the Circuit Court had no jurisdiction to award said money to Kemp Van Ee, either as a party defendant to said old cause or as plaintiff in the bill of complaint filed in said old cause and called a cross bill; and there is nothing in the pleadings or proceedings in said old cause now printed, or in the appeal record on file in this case, which shows that said Kemp Van Ee ever occupied any relation to said old cause unless as a defendant therein, or as plaintiff in the cross bill filed by him in November, 1886, in said old cause, as a supposed defendant at that time.

III.

It is now conceded that the Court below had no lawful power or jurisdiction, while sitting in the old equity cause 2170, to award money to Kemp Van Ee either as a party defendant to said old suit

or an plaintiff in the so-called cross-suit, as had been attempted in the decree of March 8th, 1894.

It is, however, claimed and contended by the appellee that by giving a new name to the Kemp bill of complaint of November, 1886, and calling it a petition of intervention instead of a cross bill, all jurisdictional difficulties will have been removed, and that the Court below, by having adopted that simple device under the guidance and direction of the Circuit Court of Appeals, and introducing Kemp Van Ee into the old cause in the character of an intervenor therein, without any action ever taken by him to that end, had enabled said Kemp to take the amount under the decree of June 20th, 1896, which he could not lawfully receive under the decree of March, 1894.

This is what was attempted by the Court below in its decree of June 20th, 1896, and the question is raised by this appeal whether or not the mode adopted by the Court below for effecting this change of decision was legitimate and within the jurisdictional authority of said Circuit Court.

If the Circuit Court could not have done this upon its own motion, and without the guidance or direction of the Circuit Court of Appeals, we presume it will not be claimed that it was lawfully done.

It is, we think, quite obvious that an Appellate Court has no jurisdiction for changing the status of the parties or their pleadings, in causes taken before them from the trial Court for review.

The Court of Appeals had decided in the appeal cause of Gregory *v.* Kemp Van Ee (No. 99) that Kemp had had no legal standing in the Court below as a litigant in the old equity cause of Gregory and Pike, and that he was not entitled to receive the money awarded him in the character in which he had claimed, and had been allowed by the Court below, in its decree of March, 1894, to recover it; but that this error of the Court below would be overcome or cured by regarding Kemp's bill of complaint not as a bill of complaint, but as an intervening petition filed by him in old cause (2170) in November, 1886, after it had been sustained by the Court below as and for a cross bill in said old cause for more than eight

years, and before Kemp himself had seen fit to ask the Court to view it in any other light, or had sought leave of Court to prosecute it in any other light than as a cross bill in the old cause.

IV.

We come now to the question whether or not the change wrought by the decree of June 20th, 1896, was one which it was within the jurisdictional power of the Circuit Court to make, under the facts and circumstances of the case. Kemp's bill of complaint was a suit or proceeding *in personam*. It prayed relief of one kind as against Pike, and of another kind as against Swift. It never took effect as against Pike, owing to his decease. It did take effect as against Swift.

The only decree or judgment, therefore, possible under that bill of complaint was one charging Swift with liability directly to Kemp Van Ee.

The Court below, by its decree of June 20th, 1896, undertakes to change that bill of complaint into a proceeding *in rem*. As a proceeding *in rem* Kemp's right would be entirely different, and the judgment or decree of the Court, and consequently its jurisdictional power, would depend on considerations wholly distinct and different from those applicable to proceedings *inter partes* or *in personam*.

The pleadings and proofs adapted to these two descriptions of causes are wholly unlike, and are governed by different rules of law.

This bill of complaint thus seeking relief against Swift personally, and that alone, had been demurred to by the defendant Gregory as not within the jurisdiction of the United States Circuit Court, where it had been brought, in view of that part of Section 1 of the Judiciary Act of March 3d, 1875, which reads as follows: —

"Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exhange."

This demurrer was overruled by the Court below by an order made Jan. 24th, 1891. (Gregory's answer, p. 4.)

This appellant was afterward ordered to answer Kemp's bill of

complaint, and he did so, protesting that the Court below had no jurisdiction to require such answer. (Gregory's answer, p. 5.)

If the above demurrer was well taken (as we submit it was), the Court below was without jurisdiction under Kemp's said bill of complaint as it stood at the time, and no decree could have been lawfully made under the same in favor of said Kemp.

V.

We next come to the question whether the Court below had any jurisdictional authority to turn Kemp's bill of complaint into a petition of intervention, and to render judgment thereon, as thus changed by it, of its own motion, and without notice to or the consent of the parties to the old cause, and without any application therefor made by or in behalf of Kemp himself.

If the Court below possessed no such power, then the act itself, when done, could have no force or effect in law in supporting the decree of June 20th, 1896, from which this appeal was taken.

It was practically conceded by the Court of Appeals, in its opinion (67 Fed. Rep. 837), that the decree of March 8th, 1894, or so much of it as related to Kemp Van Ee, was not supported or warranted by the bill of complaint called a cross bill, and it was ordered that said bill of complaint be dismissed, with costs to Gregory. If the matter had been left in that way, Kemp would have been put out of Court. To avoid this result, the Court of Appeals ordered the Circuit Court to turn the said cross bill of Kemp, by construction, into a petition of intervention, and to give it the same force and effect as if it had been originally filed by him (November, 1886) as and for an intervening petition in said equity cause 2170.

This was to be done, by the Court below, in utter disregard of the fact that said bill had up to that time been treated by the parties as a personal action or proceeding *in personam*, and had been contested as such by Gregory; that Gregory had been ordered by the Court below to answer the same, and had answered it as a party defendant thereto, and had been allowed no opportunity to resist said suit except as a party defendant to the same.

The Court below was not only ordered by the appellate court to

do this, without affording Gregory, the only defendant left to said bill, any opportunity to be heard in opposition to said change of base, but was ordered to make the same decree in favor of said Kemp thereunder, when treated as an intervening petition, as it had made when said bill had been erroneously treated as a cross bill in old equity cause 2170. The Court below obeyed this direction of the Appellate Court.

Gregory, by this appeal, calls in question this proceeding, and charges it to have been done, not only without any lawful jurisdiction for that purpose in either the Court below or the Court of Appeals, but in palpable violation of some of the most important and most elementary rules of legal procedure.

Whatever arbitrary power may be lawfully exercised by Courts of general jurisdiction, we submit that Federal Courts are not authorized to indulge in the exercise of such power as was assumed by the Court below in decreeing, as it did, the transformation of Kemp's bill of complaint into an imaginary petition of intervention, and in giving it retrospective operation for many years as such a supposititious petition of intervention.

The jurisdiction of Federal Courts is a limited one, and is conferred wholly by Statutes passed for that purpose.

It depends either upon diverse citizenship of the parties in causes *inter partes*, or upon the existence of a Federal question.

This doctrine is fully stated in the recent case of Byers *v.* McAuley (149 U. S. 608).

This Court, in its opinion in that case, observed: —

"It is true that when the Federal Court takes property into its custody, as it does sometimes by a receiver, it may entertain jurisdiction of claims against that property in favor of citizens of the same State as the receiver, or either of the parties. But that is an ancillary jurisdiction; it is in aid of that which it has acquired by virtue of a seizure of the property, and in order, it having possession, that it may make final disposition of the property. Possession of the *res* draws to the Court having possession all controversies concerning the *res*."

In Noble *v.* Union R. L. Co., 147 U. S. 165, this Court said:

"In every judicial proceeding certain facts are strictly jurisdictional and essential to validity of the proceedings, such as . . . the seizure and possession of the *res* in a proceeding *in rem*."

The peculiarity of the case at bar is that the Court below undertook to make a decree *in rem* in favor of Kemp Van Ee, without any *res* or *rem* upon which the decree could operate or take effect, and without having acquired possession of any *rem* by seizure or otherwise, which is held to be an essential condition of the exercise by any court of a jurisdiction *in rem*.

VI.

No judgments or decrees can be lawfully made by Federal Courts unless it appears affirmatively that they possess the requisite jurisdiction for the purpose.

By the fifth section of the Judiciary Act of March 3, 1875, it is made the duty of the Circuit Court to dismiss any suit brought before it when it appears that the suit does not involve a dispute or controversy properly within the jurisdiction of that Court.

Referring to this act, the Supreme Court, in Railway Co. *v.* Swan (111 U. S. 379–382), said:—

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this Court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this Court and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

In Parker *v.* Ormsby, 141 U. S. 81, the Supreme Court said:—

"Did the Court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the Court below. In the exercise of its power, this Court, of its own motion, must deny the jurisdiction of the courts of

the United States, in all cases coming before it upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act."

VII.

The Circuit Court of Appeals, in its mandate to the Circuit Court in appeal cause No. 99, directing that Court to treat Kemp's bill of complaint as an intervening petition on old cause 2170, and to render the same judgment thereon as it had before done in favor of Kemp as plaintiff in the bill of complaint regarded as a cross bill in 2170, —assumed that said bill of complaint contained matter sufficient to have supported it as an intervening petition, if it had been originally drawn and filed with the intention of making it a petition of intervention.

We submit that said bill of complaint does not contain the elements necessary to enable the Court below to have taken jurisdiction of it as a petition of intervention, even if it had been so labelled and intended when originally filed in the old cause.

A petition of intervention is a proceeding *in rem*. The only *res* mentioned or referred to in Kemp's bill of complaint was the $15,000 Swift note, payable to Jones and held by Pike in Maine. This was at most a mere *chose in action*, not in possession of the Court below, and not even capable of being reduced to possession by the Court below.

The prayer of Kemp's bill as against Pike was that

"said Pike may be compelled by decree of this Honorable Court to surrender the said note or instrument for $15,000, now in his possession, to the plaintiff, or some disinterested person appointed by this Honorable Court to receive and hold the same for the protection of the interests of the plaintiff (himself) and of the other persons interested therein."

SUMMARY.

Kemp Van Ee was not made a party to old equity cause No. 2170 by Gregory, the plaintiff in that cause, at any time. That old cause was removed from the State Court to the Circuit Court in May, 1885. It had been pending in the Circuit Court as much as a year and a half before Kemp's bill of complaint was brought by him

as a cross-bill in said old cause. The Circuit Court of Appeals, in the opinion accompanying its decree of Jan. 31,1895, held and determined that Kemp had no right to bring or prosecute said bill of complaint as a cross-bill in the old cause, and ordered the dismissal of the same; but it also held and determined that this so-called cross-bill, of Kemp, might rank or be regarded in the Court below as having been originally (in 1886) a petition of intervention instead of a cross-bill. Thereupon (June 20, 1896) the Court below adopted this construction of Kemp's bill, and decreed a large sum of money to Kemp as having been an intervening petitioner in said old cause ever since 1886.

This is what was done by the Circuit Court after that Court had entertained Gregory's demurrer to Kemp's bill, as a proceeding *inter partes*, for want of jurisdiction; and had required Gregory to make answer to said bill of complaint as to a suit *in personam*, and had extended time for Kemp to take evidence therein adversely to Gregory, and after the old cause of Gregory against Pike and Swift had been dismissed as against Kemp, and Kemp's bill had become thereby wholly disconnected from Gregory's old cause, 2170, if previously it had been so connected.

Upon that state of facts it is now contended by the counsel for appellee, that the appeal taken by Gregory, now before this Court, was taken from a decree made in the old equity cause of Gregory and Pike, and not in the cause of J. C. Kemp Van Ee, complainant in bill filed by him Nov. 27th, 1886, against Charles A. Gregory and others, and that for this reason alone said appeal should be dismissed.

This contention is without any foundation in fact.

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Solicitor for the Appellant.